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No. 84-1708

In The
Supreme Court of the United States
October Term, 1984

THE OKLAHOMA PUBLISHING COMPANY,
Petitioner,

v.

OKLAHOMA HOSPITAL ASSOCIATION, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RULES OF PROCEDURE:

Rule 26(c), Fed. R. Civ. P. 11

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I. INTRODUCTION

In its Petition for Certiorari, the Oklahoma Publishing Company (hereinafter "OPUBCO") continues its attempts, rejected in the courts below, to bring itself within the scope of decisions of this Court and lower courts concerning the right of access of the press to judicial proceedings and other presumptively public sources of information. But the documents to which OPUBCO seeks access were produced during pre-trial discovery pursuant to protective orders stipulated and agreed to by the parties. The documents were never introduced in evidence or made a part of the public record. The issues raised by OPUBCO have been decided adversely to OPUBCO's posi-

tion by this Court's decision last term in *Seattle Times Co. v. Rhinehart*, — U.S. —, 52 U.S.L.W. 4216, 81 L.Ed.2d 17 (1984). The inescapable conclusion is that OPUBCO seeks access to materials to which it has no entitlement or right, either under the First Amendment to the Constitution, or under common law, and certiorari should therefore be denied.

This action was commenced by the Respondents, Oklahoma Hospital Association and five of its member hospitals (hereinafter referred to in the aggregate as "OHA"), seeking injunctive and declaratory relief concerning the methodology by which the Oklahoma Department of Human Services (hereinafter "DHS") calculated reimbursement to hospitals for inpatient hospital services provided pursuant to Oklahoma's medical assistance program. This case was certified as a class action by the District Court, the OHA being named representative of a class consisting of approximately 117 hospitals (Respondents' Appendix to Brief in Opposition to Petition for Writ of Certiorari at A-2 (hereinafter "Resp. App. at —"). OPUBCO was not a party to the action.

A three day trial was held on OHA's request for a preliminary injunction. This relief was denied, but in so ruling, the District Court, after finding there was a likelihood OHA would prevail on the merits, directed that trial on the merits should proceed on an expedited schedule, at a date only some six weeks later. (Appendix to Petition for Writ of Certiorari at 2a, 12a) (hereinafter "App. at —"); (Resp. App. at A-17 to A-20). Soon thereafter, DHS served OHA with a massive document request, and OHA served a similar but narrower request on DHS.

With the consent, and upon the stipulation of OHA and DHS, the District Court entered protective orders governing the conditions under which these hundreds of thousands of documents were to be produced during this expedited phase of trial preparation. The orders provided that all copies made of documents and records produced by OHA or DHS were to be maintained in strict confidence, and access to such copies limited to certain specified individuals (such as management level officers of the parties, counsel and expert witnesses), having need therefor in the course of trial preparation. The orders further required that the confidential status of the document copies be maintained throughout the completion of the action, with the exception that any documents introduced in evidence were to lose their confidential status; further, all copies of documents not introduced in evidence were to be destroyed or returned to the party producing the same, upon the completion of the litigation.

The protective orders clearly reflect a good faith effort by the parties to construct a comprehensive procedure for handling extensive document production encompassing hundreds of thousands of documents, in a short time period. This time limitation was mandated by the expedited trial schedule, which was in turn dictated by Eleventh Amendment considerations which prohibited the OHA from recovering retroactive money damages from the DHS (Resp. App. at A-17, A-18; App. at 2a, 12a).

The procedure agreed to by the parties permitted complete production to occur without the loss or waiver of such objections as relevance, scope of discovery, or privilege, and without the loss of confidentiality. The alternative would have been to require the parties and the Dis-

trict Court to make a painstaking and time-consuming review of massive numbers of documents during the expedited pre-trial phase, so as to be able to make necessary rulings on objections to production. This would have consumed much of the Court's time. It would also have consumed much of the time available to the parties and their counsel during this brief pre-trial period, time which was critically needed for other aspects of trial preparation.

On the eve of trial, the parties reached a settlement which the District Court, after following established class action procedures concerning notice and hearing, accepted and approved. The Stipulated Settlement Agreement, and all exhibits attached thereto, were filed that same day, and were open to public inspection. No portion of the settlement proceeding before the District Court was closed to the public, and no records filed with the District Court were sealed.

Three days prior to the hearing to consider the proposed settlement, OPUBCO filed its Motion to Vacate the protective orders. The DHS took no position on OPUBCO's Motion, although it did state in the hearing on that Motion before the District Court that it stood by its agreements with the OHA concerning production of the documents as set forth in the stipulated protective orders, unless and until those orders were modified, and that the DHS did not request that any such modifications be made.

The OHA strenuously opposed OPUBCO's requests on the grounds that OPUBCO had no right of access to discovery material not part of the public record or introduced in a public proceeding; that OPUBCO had no stand-

ing to assert the First Amendment rights of the parties to disseminate the discovery materials when the parties themselves chose not to do so; and that OPBUCO's request that it be granted compulsory access to the documents was impossible to grant without violation of the parties' own First Amendment rights. The District Court's order (App. at 11a) determined that the document copies in question were not part of the public record; that OPUBCO had no standing to assert the First Amendment rights of the parties; and that the court could not compel the parties to grant OPUBCO access to the discovery documents. The opinion of the Court of Appeals (App. at 1a) determined that OPUBCO's contention it was merely seeking the removal of barriers to normal access to sources of information was without merit; that OPUBCO lacked standing to assert or exercise the First Amendment rights of the parties; and that it was unlikely OPUBCO could obtain the redress sought even if the protective orders were vacated, for the simple reason that the court would be powerless to compel the parties to grant OPUBCO access to the documents.

OPUBCO's statement of the reasons for granting the Writ in the instant case and its statement of the questions of law presented which warrant review by this Court, simply ignore the facts of this case. These facts clearly support the Order of the District Court and the decision of the Court of Appeals.[1]

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[1] OPUBCO also ignores the fact that all documents and records of the DHS are available to OPUBCO for inspection, and, as recognized by the District Court (App. at 12a), all documents furnished by the DHS pursuant to discovery are available to OPUBCO for review. It is only the documents provided by the OHA and its member hospitals that are involved herein.

OPUBCO seeks access to discovery documents privately exchanged between the parties to litigation which, most importantly, were never introduced in any portion of the proceeding in the District Court, never became part of the public record, and never became part of any source of information to which public access exists. As is clear from the Order of the District Court and the opinion of the Court of Appeals, OPUBCO originally sought an order of the District Court compelling the parties to the litigation to provide OPUBCO with access to these private documents. It was only after the absurdity of this position became apparent that OPUBCO attempted to cast this matter as one involving First Amendment rights of access.

OPUBCO similarly attempts to imply that the protective orders were wholly unjustified and simply entered by the District Court upon the request of the parties. This utterly ignores the nature of the case, the volume of the material involved, the time within which the production was to be accomplished, and other factors which were well known to the District Court and to the parties (App. at 16a-20a). Rather than being a departure and a deviation from the principles established by this Court, the decisions of the District Court and the Court of Appeals are clearly in harmony with prior decisions of this Court, as well as other Courts of Appeal, and should not be disturbed.

II. THE CIRCUIT COURT'S HOLDING THAT OPUBCO LACKS STANDING TO CHALLENGE THE PROTECTIVE ORDERS IS CORRECT.

In arguing that the Court of Appeals' decision is in conflict with decisions of this Court and other Courts of

Appeal, OPUBCO cites decisions which apply principles of law with which the OHA completely agrees, but which have no application to the facts of this case. The case of *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), involved the press' standing to seek access to evidence submitted during a criminal trial. The case of *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984), involved the transcript of voir dire proceedings in a criminal trial. Similarly, the cases of *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); and *Gannett Co. v. De Pasquale,* 443 U.S. 368 (1969), each involved the press' standing to challenge the closure of a public proceeding.

In the instant case, OPUBCO sought access to private documents, which, although exchanged between parties to litigation, had never become part of the public record.[2] Clearly, decisions with respect to the press' right of access must take cognizance of the factual circumstances surrounding the case. As has been long recog-

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[2] At pp. 6 and 7 of its Petition, OPUBCO cites out of context portions of the deposition of a DHS auditor, pertaining to the propriety of certain hospital expenditures reflected by a few of the documents in question. The short answer is that notwithstanding a searching review of all the documents by a small army of DHS accountants and auditors, the DHS never made or attempted a showing that reimbursement had been sought for any of these expenditures under the Medicaid program. Indeed, it was after this searching review of the documents that DHS decided to settle. OPUBCO's reference to these materials is therefore nothing more than a transparent effort to inflame the Court by reference to documents which the Court of Appeals stated had not "passed the threshold tests of relevancy and admissibility," (App. at 8a-9a).

nized by this Court, the right to gather news is not unlimited. The extent of that right is no greater than the right of the general public to obtain information. *Nixon v. Warner Communications, Inc., supra; Pell v. Procunier,* 417 U.S. 817 (1974); *Zemel v. Rusk,* 381 U.S. 1 (1965); *Branzburg v. Hayes,* 408 U.S. 665 (1972).

OPUBCO persists in citing and relying upon cases involving media access to public records, trials, or hearings to support its attempts to gain access to the documents in question. This Court, in *Seattle Times,* has recently examined the very issues presented by OPUBCO. The *Seattle Times* decision teaches that there are very different considerations with respect to public records and judicial proceedings on the one hand, and pre-trial discovery, on the other. This is a distinction which OPUBCO would have the Court now ignore. Rather than overlooking the body of precedent concerning the access of the press to judicial proceedings and public records, it is clear that the Court of Appeals correctly recognized that body of authority as being inapplicable under the facts of this case, despite OPUBCO's efforts to misconstrue this matter as coming within the purview of those authorities.

The protective orders entered by the District Court in this matter in no way restrain OPUBCO from publishing or disseminating any information which may come into its possession, or from having access to any information which is part of the public record. OPUBCO is in no way restrained by the District Court's action, nor is it foreclosed from access to any source of information to which it is entitled to have access. The protective orders leave OPUBCO's First Amendment rights untouched.

OPUBCO, under the guise of asserting its First Amendment rights, would have this Court destroy all distinctions between public and private sources of information, unreasonably impede the discovery process, and unnecessarily burden the district courts in the entry of protective orders. None of the parties to this action objected to the terms of or the entry of the protective orders; to the contrary, the orders were entered upon the voluntary stipulations of the parties. None of the parties objected to the protective orders based upon the parties' own First Amendment rights. No hearing or proceeding before the District Court was ever closed. No pleadings on file in this case are held under seal. The three-day trial on preliminary injunctions was open to the public, as was the hearing to consider the proposed settlement, and all of the exhibits and testimony received at those hearings are of public record. OPUBCO has not been denied access to any public records, nor has it been excluded from any hearing.[3] In short, OPUBCO seeks to have this Court ignore the basic proposition long

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[3] At pages 4 and 5 of its Petition, OPUBCO makes much of the Motion to Disqualify filed against the District Judge by DHS. This Motion was not filed until after the District Judge had ruled, in connection with the preliminary injunction issue, that there was a likelihood OHA would prevail on the merits, and set the case on an expedited trial schedule (Resp. App. at A-17 to A-20). This motion was obviously filed for tactical reasons, as a reaction to the ruling on the preliminary injunction issue. In any event, the Motion to Disqualify was fully briefed, and given a full evidentiary hearing and oral argument. DHS did not seek appellate review of the District Judge's denial of the Motion to Disqualify. Most importantly, the hearing on the motion was not closed, nor was any pleading or exhibit filed in connection therewith sealed. Every aspect of the resolution of this motion was open to the public.

recognized by this Court, that the right of freedom of speech does not carry with it the right of unrestrained access to information, *Pell v. Procunier, supra; Zemel v. Rusk, supra.*

In those cases where a protective order has been attacked on the basis of the First Amendment, including the *Seattle Times* case, the right of a party to disseminate information obtained through civil discovery has been involved. In the instant case there has been no such involvement. If the parties hereto have agreed and stipulated to the protective order and have chosen not to assert their First Amendment right to disseminate information that they have obtained in discovery, OPUBCO has no standing to assert that right upon their behalf, as recognized by both the District Court and the Court of Appeals. It is a fundamental concept, long recognized by the courts, that one may not claim standing to vindicate the constitutional rights of a third party. *See Barrows v. Jackson,* 346 U.S. 249 (1953); *In re Agent Orange Product Liability Litigation,* 96 F.R.D. 582 (E.D.N.Y. 1983).[4]

Lastly, vacating the protective orders would not grant OPUBCO the relief it seeks. As noted by the District Court and Court of Appeals in this case, the parties can-

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[4] In the *Seattle Times* case, this Court denied the right of a newspaper-party, the Seattle Times, to disseminate documents obtained by it (subject to protective order) in pretrial discovery; OPUBCO, as a non-party, surely cannot be afforded greater rights than those enjoyed by a party, as recognized in the *Agent Orange* cases cited herein.

not be compelled to provide the documents in question to OPUBCO, and OPUBCO cannot assert the parties' First Amendment rights with respect to these documents in order to obtain access to them. Moreover, as recognized by the lower courts in this case, the relief originally sought by OPUBCO, that of compulsory access to the documents, cannot be granted without violating the parties' First Amendment rights. It is abundantly clear that the ultimate relief sought by OPUBCO, access to the OHA's private documents, simply cannot be granted by a court, as was clearly recognized by both the District Court and the Court of Appeals.

III. THE DECISIONS BELOW, IN REFUSING TO VACATE THE PROTECTIVE ORDERS, ARE PROPER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE AND ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS.

OPUBCO ignores the obvious facts and circumstances of this case, as well as the clear import of recent decisions of this court and lower courts. In arguing the applicability of the provisions of Rule 26(c), Fed. R. Civ. P., OPUBCO blurs the distinction between the rights of a party to disseminate information obtained in the discovery process and the rights of access of a non-party to documents not part of the public record. OPUBCO further ignores the circumstances surrounding this case, as well as the realities of litigation and discovery practice.

As this Court recognized in *Seattle Times,* it is essential that trial courts have substantial latitude to fashion appropriate protective orders as part of the broad and liberal nature of the discovery process. OPUBCO has persisted since its first appearance in the District Court in ignoring the difference between discovery material and the public record. This difference has been recognized by numerous lower courts that have considered the matter and have ruled that there is no right of access to such documents, *see e.g., In re Agent Orange Products Liability Litigation,* 98 F.R.D. 539 (E.D.N.Y. 1983).

To follow OPUBCO's argument to its conclusion, a district court, in every instance where a protective order concerning documents was sought, would be required to conduct a full scale hearing and to make findings on a document by document basis. Especially in cases such as the present one, where the orders were agreed to in good faith and proposed by the parties themselves as practical devices to permit inspection (and, if requested, copying) of hundreds of thousands of private hospital documents within the few weeks remaining prior to an expedited trial date, such a process would be an obvious waste of judicial resources. Good cause clearly existed. And absent the agreement of the parties and the stipulated protective orders in this case, the District Court would have been required to review the massive numbers of documents in question to determine objections on relevancy and privilege grounds, all within the time constraints imposed by the expedited trial schedule. This Court, in *Seattle Times,* recognized the practical aspects of discovery and was critical of the imposition of require-

ments that would have resulted in unduly burdening and complicating the discovery process, 81 L.Ed.2d at 29, n.23. As the Court of Appeals stated:

> "The Supreme Court recently stated that 'pre-trial depositions and interrogatories are not public components of a civil trial.' *Seattle Times, supra,* 52 U.S.L.W. at 4616. This is so, the Supreme Court recognized, because '[m]uch of the information that surfaces during pre-trial discovery may be unrelated or only tangentially related, to the underlying cause of action.' *Id.* Such is the case here. The district court entered protective orders in order to expedite a discovery process involving literally hundreds of thousands of documents, many of which were subject to claims of privilege. At that stage in the litigation, those documents had not been filed with the court and certainly had not satisfied threshold tests of relevancy and admissibility. They therefore were not available to the public generally, and OPUBCO does not have standing to complain about the existence of the protective order. *Cf. Agent Orange, supra,* 96 F.R.D. at 584 ('The same factors that support access to judicial records and other public documents . . . simply are not implicated where the materials were obtained by a party through discovery but have not been filed with the court'). . . ." (App. at 8a-9a).

OPUBCO's argument that the protective orders in question should be vacated because the District Court failed to consider First Amendment issues is ludicrous. OPUBCO raised the issue at the hearing to vacate (App. 11a). The District Court reviewed the grounds for the granting of the protective orders and rejected OPUBCO's arguments (App. 12a-13a). For OPUBCO to now state

that the District Court failed to consider those issues is disingenuous at best.

IV. CONCLUSION

OPUBCO has persistently ignored or misconstrued the facts of this case and injected irrelevant matters in its attempts to obtain relief to which it is not entitled. The District Court and the Court of Appeals correctly determined, based upon the facts and circumstances of this case, that OPUBCO simply has no right to the relief requested. OPUBCO attempts to cast those decisions as being in conflict with prior decisions of this Court and other Courts of Appeal. OPUBCO is simply wrong.

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-83-1274-BT

OKLAHOMA HOSPITAL ASSOCIATION, et al.,

Plaintiffs,

v.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
PRELIMINARY INJUNCTION

(Filed August 26, 1983)

On July 13, 14 and 15, 1983, a hearing was had and evidence received concerning the plaintiffs' application for a preliminary injunction. On May 10, 1983 the plaintiffs commenced this action against the Oklahoma Department of Human Services ("DHS") and its director, Henry A. Bellmon. The plaintiffs allege the defendants' amendment to the State of Oklahoma Medicaid State Plan of Hospital Reimbursement violates several federal and state constitutional, statutory and regulatory provisions and the terms of the Medicaid provider agreements between the plaintiff hospitals and DHS in that hospitals will be reimbursed under the amendment at rates less than the rates required by law. Plaintiffs further allege that the amendment was enacted without proper notice and comment procedures and without a meaningful op-

portunity for participation in the process by the Oklahoma Medical Care Advisory Committee. Plaintiffs seek declaratory and injunctive relief, including a preliminary injunction preventing the defendants from continuing to implement the amended reimbursement methodology and from revising the reimbursement methodology in any manner that does not meet the pertinent substantive and procedural requirements. Defendants in response assert that the amended plan is proper in all respects and that the plaintiffs are not entitled to the requested preliminary injunction.

After considering the evidence presented, arguments of counsel, and the applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action arising under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, (commonly known as the Medicaid Act), the implementing federal regulations, the United States Constitution, the Oklahoma Statutes and was also brought by plaintiffs under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

2. The original named plaintiffs in this case were the Oklahoma Hospital Association and five specified Oklahoma hospitals. On July 5, 1983 the Court entered an order on motion of the plaintiffs certifying this case as a class action consisting of approximately 117 Oklahoma hospitals.

3. The defendants in this action are the Oklahoma Department of Human Services ("DHS"), and its direc-

tor, Henry A. Bellmon. By order the new DHS diector Robert Fulton has been substituted as a party defendant for Henry A. Bellmon and the action proceeds against Fulton in his representative capacity.

4. Defendant DHS is the state agency charged with responsibility for the administration of the Oklahoma Medicaid Program.

5. The Department of Health and Human Services ("HHS") is the federal agency charged with responsibility for the administration of the federal aspects of the Medicaid program.[1]

6. State Medicaid programs, including Oklahoma's, are required to reimburse hospitals for inpatient hospital services in accordance with the federal Medicaid law and the regulations implementing that law.

7. Pursuant to the Medicaid Act, 42 U.S.C. § 1396 (a)(13)(A), states are required to pay hospitals for inpatient hospital services furnished to Medicaid beneficiaries at rates that are:

> reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and

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[1] The Court has concluded HHS is not an indispensable party to this action. *See Arthur C. Logan Memorial Hospital v. Toia*, 441 F.Supp. 26, 27 (S.D.N.Y. 1977); *Montana Deaconess Hospital v. Department of Social and Rehabilitation Services*, 538 P.2d 1021, 1024 (Mont. 1975). *See also* Court's Exhibit 1, Letter to the Court from Robert P. Jaye, Deputy Assistant General Counsel, Department of Health and Human Services.

to assure that individuals eligible for medical assistance have reasonable access to . . . inpatient hospital services of adequate quality; . . . .

7. HHS has published regulations implementing 42 U.S.C. § 1396(a)(B)(A). 42 C.F.R. Part 435. Those regulations provide in pertinent part:

447.252 General requirements.

(a) *Payment rates.* (1) The Medicaid agency must pay for inpatient hospital services and long-term care facility services through the use of rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers to provide services in conformity with applicable State and Federal laws, regulations, and quality and safety standards.

(2) The payment rates used by the Medicaid agency must be determined in accordance with methods and standards developed by the agency.

(3) With respect to inpatient hospital services—

(i) The methods and standards used to determine payment rates must take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs; . . .

* * *

(iii) The payment rates for such services must be adequate to assure that recipients have reasonable access, taking into account geographic location and reasonable travel time, to inpatient hospital services of adequate quality.

* * *

(b) *State findings.* The Medicaid agency must find that the rates used to reimburse providers satisfy the requirements of paragraphs (a)(1) and (1)(3) of this section.

(c) *State assurances.* The Medicaid agency must make assurances satisfactory to the Secretary that the requirements of paragraphs (a)(1) and (a)(3)(iii), (b), and (f) of this section are met and that, in making significant changes in its methods and standards for determining payment rates, it has complied with the public notice requirement in § 447.254.

(d) *Submittal of assurances and related information.* The Medicaid agency must comply with the requirements regarding submittal of assurances and related information in § 447.255. . . ."

* * *

8. Prior to April 1, 1983, Oklahoma reimbursed hospitals for inpatient services furnished to Medicaid beneficiaries the hospitals' actual reasonable costs of providing such services based upon the federal Medicare program's reasonable cost formula.

9. Background of the federal Medicaid program:

While participation in the federal Medicaid program is voluntary, once a state chooses to participate it must comply with federal statutory requirements. *Harris v. McRae,* 448 U.S. 297, 301, 100 S.Ct. 2671, 2680, 65 L.Ed. 2d 784, 794 (1980).

Originally, states were required to reimburse hospitals for inpatient services provided to Medicaid patients on the basis of cost methodology used by the federal Medicare program. In response to concerns about spiraling costs, Congress amended Title XIX in 1972 to allow, and even encourage, each state to develop its own alternative reimbursement scheme. As explained in *Alabama Nursing Home Association v. Harris,* 617 F.2d 388, 392 (5th Cir. 1980):

> Congress intended that state authorities in developing methodologies for reasonable cost related reimbursement have great flexibility in the areas of cost-finding and rate-setting. The legislative history indicates that states are to be free to experiment with methods and standards for payment that would be simpler and less expensive than the complex Medicare reasonable cost formula. See S.Rep. No. 92-1230, 92d Cong., 2d Sess. 287 (1972). . . . Additionally, Congress intended that states have freedom both to define allowable cost items and to set a value on the reasonable cost of such items.

The legislative history of the 1980 Boren amendment, which replaced the "reasonable cost-related" reimbursement rate standard for nursing and intermediate care facilities with the current "efficiently and economically operated facilities" standard, indicates congressional "intent that a State not develop rates under this section solely on the basis of budgetary appropriations." H.R. Conf.Rep. 1479, 96th Cong., 2d Sess. 154, reprinted in 1980 U.S.Code Cong. & Ad. News 5526, 5903, 5944.

It is clear that in moving Medicaid away from Medicare reimbursement standards and encouraging alternative reimbursement plans in 1972, in eliminating the reasonable cost standard as applied to nursing homes in 1980 and hospitals in 1981, and in cutting Medicaid funding in 1981, Congress intended to encourage Medicaid cost containment. The legislative history of the Omnibus Budget Reconciliation Act of 1981, which set the current standards for hospital reimbursement rates found in 42 U.S.C. § 1396a(a)(13)(A), states:

> In eliminating the current requirement that States pay hospitals on a Medicare "reasonable cost" basis for inpatient services under Medicaid, the Committee

> recognizes the inflationary nature of the current cost reimbursement system and intends to give States greater latitude in developing and implementing alternative reimbursement methodologies that promote the efficient and economical delivery of such services."

H.R.Rep. No. 158, 97th Cong. 1st Sess. 293 (1981).

Prior to April 1, 1983, the Oklahoma legislative appropriation to DHS was reduced by $40,000,000.00. As a result DHS was making substantial across the board cuts in all of its services and programs. The principal motivation for the instant prospective Medicaid reimbursement methodology was the budget shortfall. During the first half of 1983 the decline in Oklahoma sales tax receipts persisted, thus prolonging DHS' budgetary problems.

10. By letter dated January 28, 1983, DHS advised the Medicaid providers in Oklahoma that the State of Oklahoma would be changing its Medicaid reimbursement plan to a prospective system effective April 1, 1983 due to rapidly declining state sales tax receipts and a significant rise in reimbursement payments. (D-14). A "proposed hospital payment method" was included with the letter and noted that DHS was aware alternative proposals might be developed by the Oklahoma Hospital Association as well as by other interested parties.

11. On February 24, 1983 DHS advised the Medicaid providers by letter that their current provider agreements with DHS were being terminated effective April 1, 1983 and that due to changes in federal law and the development of a new reimbursement methodology new provider agreements would have to be entered into between DHS and each provider wishing to continue in the Medicaid program. (D-18). During the month of March 1983 the

Medicaid providers throughout the State of Oklahoma in a spirit of cooperation executed the new provider agreements and returned them to DHS, although Oklahoma's new prospective Medicaid reimbursement plan was still in the drafting stage.

12. By March 21, 1983 the proposed Oklahoma Medicaid plan had been modified substantially from the original January 28 proposal. On that day DHS officials presented to the Oklahoma Medical Care Advisory Commission ("MCAC") in oral form for the first time a proposed revision to its state Medicaid plan with respect to the methodology used for reimbursing hospitals for inpatient services. The MCAC was not given an opportunity to review the plan or to extensively comment upon it because the MCAC was advised by DHS that the plan revision would be submitted to the Oklahoma Welfare Commission the following day, March 22, 1983 for its approval, independent of what action the MCAC took with respect to the plan revision. The MCAC approved the proposed plan with one vote in opposition and one abstention with the understanding dialogue would continue in reference to further revisions. The next day, the proposed Oklahoma plan was presented to the Oklahoma Commission for Human Services by DHS personnel, and was approved by unanimous vote.

13. Thereafter, DHS published notice of the proposed change in the Oklahoma reimbursement methodology in the Sunday, March 27, 1983 editions of the Daily Oklahoman and the Tulsa World (D-25).

14. DHS continued its analysis and discussions with HHS which resulted in further modifications of the pro-

posed Oklahoma plan, including the breakout of levels of care. By letter dated April 15, 1983 the defendant Bellmon submitted Oklahoma's proposed Medicaid plan to the Dallas regional office of HHS for its required approval. The Dallas regional office immediately forwarded the request to HHS's main office in Baltimore. The April 15 letter made the assurances required in 42 C.F.R. § 447.252 with the exception of the assurances that the State had made the findings of fact required by 42 C.F.R. § 447.252(b) regarding the reasonableness and adequacy of its rates, and that such rates are adequate to assure that recipients have reasonable access to inpatient hospital services of adequate quality (D-33, 34). By letters of April 25 and April 26, 1983, defendant Bellmon provided the excluded assurances and additional clarifications requested by HHS as well as an appeal procedure[2] (D-35 through 43). On April 27, 1983 HHS approved DHS's state plan amendment. DHS submitted no factual data, empirical analysis, studies, or other information to HHS in support of its proposed state Medicaid plan.

15. During the months of March and April representatives of various providers objected to substantive aspects of the proposed plan, to the fact they were not being given an adequate opportunity to review and consult, and further that the hospitals were required to approve the plan before it had been finalized.

16. On April 28, 1983, retroactive for services furnished on or after April 1, 1983, DHS modified its state Medicaid plan with respect to the methodology to be used

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[2] The appeal process will not permit a substantive review beyond the scope of the specific provisions of the plan.

in calculating payments to hospitals for inpatient hospital services furnished to Medicaid patients. This methodology provides that DHS will reimburse hospitals for such services on a per diem basis *at the lesser of:*

1. the hospital's actual costs for its most recent cost reporting period ending prior to June 30, 1982, adjusted by the rate at which the component of the consumer price index for all medical rose through June 30 of that calendar year;
2. the hospital's actual costs for its most recent cost reporting period ending prior to June 30, 1980, adjusted by the rate at which the consumer price index for all medical care rose through June 30 of that calendar year;
3. or the actual cost of the 60th percentile facility's cost after every hospital's actual costs for the most recent cost reporting period ending prior to June 30, 1980, has been adjusted as described under (2), above.

These costs are to be determined separately for five different types of care within the hospital—routine, nursery, intensive, coronary and burn. An exception is provided in the plan for hospitals that demonstrate that reimbursable Medicaid patient days constitute at least 25% of the hospital's total days of inpatient services; excepted hospitals are reimbursed under methodology (1) above. A small number of the plaintiff hospitals qualify for the exception. The principal exception hospitals are state owned and operated.

17. DHS conducted no factual or empirical analysis or other evaluation concerning the relationship between its proposed payment rates and the costs that must be incurred by efficiently and economically operated hospi-

tals in providing services to Medicaid beneficiaries. DHS simply concluded reimbursement at the 60th percentile level for the cost reporting period ending prior to June 30, 1980, plus the inflation factor, should adequately compensate the efficiently and economically operated hospital for the balance of 1983.

18. DHS estimates that its new payment methodology would reimburse hospitals $13,000,000 less than the hospitals received from DHS during DHS' fiscal year that ended on June 30, 1982 (D-60).

19. DHS gave inadequate consideration in developing the new methodology to certain factors that significantly impact on hospital costs such as "fixed capital costs, the costs of graduate medical education programs, and costs related to distinctions in hospital patient-mix and the level of technology and sophistication of services offered at different hospitals. While there is nothing in the Medicaid Act that specifically requires that these factors be addressed in a state's reimbursement scheme, it is the reasoned judgment of persons experienced in developing and administering hospital care prospective payments systems that it is not possible to have a rational program that meets the federal standard without taking into consideration these well recognized factors that impact on hospital costs (Schramm Depo., pp. 118-120, 160-161).

20. Even if a hospital theoretically receives its costs, but its rates are based upon the hospital's 1980 cost data, the rates do not reflect reimbursement for any capital expenditures incurred since 1980.

21. The House Report to the 1981 Medicaid Amendments explicitly provided:

> "The Committee intends states to recognize that facilities that provide teaching services or other specialized tertiary care services may have operating costs which exceed those of a community hospital. The Committee is concerned that the reimbursement methods established by the states recognize the need to provide a full range of both primary care and tertiary care services to Medicaid beneficiaries and take into account the differences in operating costs of the various types of facilities needed to provide this broad scope of services. . . ."

H. Rep. No. 97-158, Vol. II, 97th Cong., 1 Sess., at 294 (June 19, 1981).

Large referral hospitals provide more specialized personnel and equipment within the various levels of care, notably routine and intensive care, than do smaller facilities. A rational plan cannot ignore the distinctions between the costs of a 600 bed urban medical center and a 60 bed rural community hospital.

22. HHS did not look behind the assurances that DHS made, but rather, reviewed DHS' methodology to insure that DHS, in fact, made the required assurances. HHS made no determination the DHS assurances were founded upon supporting factual information.

23. Some economists would question DHS' selection of the "all medical care" component of the consumer price index ("AMCI") to use in inflating a hospital's 1980 and 1982 costs forward to the new rate period. The AMCI includes price increases for many types of medical care, including physician, dentist, and pharmacy services, that are unrelated to inpatient hospital care. The

AMCI is a price index and not a cost index; in other words it measures the degree to which prices of purchasing health care rose in a given time period and not the degree to which the costs of providing that care rose (Schramm Depo., p. 143; Lyman Depo., p. 59). Other more accurate inflation indexes are available. The most significant problem with using the AMCI is that it is inappropriate to develop a rate under a prospective system using prior cost data when the inflation factor utilized to roll the past costs forward to the start of the new payment system does not reflect actual hospital cost inflation prior to the date upon which the prospective rates are implemented (Schramm Depo., pp. 146-149).

24. DHS cites the case of *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511 (5th Cir. 1983) in which Mississippi's prospective Medicaid plan was recently approved by the Fifth Circuit Court of Appeals in March 1983. The Court notes that there is a marked contrast between the Oklahoma plan and the Mississippi plan. The Mississippi plan passes through capital costs, groups hospitals by bed size, accounts for the costs of medical education, establishes a cap on noncapital expenditures for each peer group, accounts for varying labor costs in urban and rural locations, adjusts base period costs for hospital industry inflation, and establishes a substantive appeal process which permits costs reimbursement for legitimate exceptions to the plan.

25. If a hospital receives inadequate Medicaid cost reimbursement it has the following options: (1) refuse to treat Medicaid patients or reduce its Medicaid patient

load[3], (2) provide a lower level of care to Medicaid patients than that received by other patients, (3) cut its costs down in whatever manner may be possible, (4) make up the difference out of accumulated surplus or endowment funds, or (5) charge other patients or their insurers the additional cost of treating Medicaid beneficiaries.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and the doctrine of pendent jurisdiction. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

2. Insofar as a Finding of Fact above might be properly characterized a Conclusion of Law it is incorporated herein.

3. The preliminary injunction requested by the plaintiffs is an extraordinary equitable remedy granted only where the right to relief is clear. *Goldammer v. Fay,* 326 F.2d 268, 270 (10th Cir. 1964); 11 Wright and Miller, *Federal Practice and Procedure:* Civil § 2942, at 368 (1973). To obtain a preliminary injunction the plaintiffs must establish the following: (1) a substantial likelihood of recovery on the merits; (2) a showing that the plaintiffs will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the plaintiffs outweighs whatever damages the proposed injunction

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[3] This is an impractical option due to the policies of most hospitals and religious tenets of some hospitals to admit all patients as well as the medical profession's commitment to not refuse treatment to any sick person.

may cause the defendants; and (4) a showing that the issuance of the injunction would not be adverse to public interest. *Otero Savings and Loan Ass'n v. Federal Reserve Bank,* 665 F.2d 275, 278 (10th Cir. 1981); *National Indian Youth Council v. Andrus,* 623 F.2d 694, 695 (10th Cir. 1980) (per curiam); *Lundgrin v. Claytor,* 619 F.2d 61, 63 (10th Cir. 1980); *Continental Oil Company v. Frontier Refining Company,* 338 F.2d 780, 781 (10th Cir. 1964).

4. Standard of review: As the action of a governmental agency is in question, the Court concludes it should be tested by the "arbitrary and capricious" standard. Thus, the inquiry provoked is whether the administrative decisions were based on relevant factors or whether there was a clear error in judgment. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). The Court is not empowered to substitute its judgment for that of the agency so the standard of review is a narrow one. The Court's function is exhausted where a rational basis is found for the agency action taken. *Sabin v. Butz,* 515 F.2d 1061, 1067 (10th Cir. 1975); *see Coleman v. Darden,* 595 F.2d 533, 539 (10th Cir. 1979); *Hurley v. United States,* 575 F.2d 792, 793-94 (10th Cir. 1978); and *Squaw Transit Company v. United States,* 402 F.Supp. 1278, 1286-87 (N.D. Okl. 1975) (three-judge panel).

The Fifth Circuit noted in *Mississippi Hospital Ass'n, Inc. v. Heck'er,* 701 F.2d 511, 516 (5th Cir. 1983), a case also involving a state's prospective Medicaid reimbursement plan, that a "presumption of validity" attaches to the "agency action."

It is also a well-settled rule of statutory construction that interpretation given a statute by the agency charged with its administration is entitled to deference from the courts. *Federal Election Commission v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31-32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981); *see Franks v. Nimmo,* 683 F.2d 1290, 1295 (10th Cir. 1982), and *Kenneth v. Schmoll,* 482 F.2d 90, 95 (10th Cir. 1973). However, the courts are the final authorities on issues of statutory construction and "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Commission v. Democratic Senatorial Campaign Committee, supra,* 454 U.S. at 31-32.

5. By the evidence presented the plaintiffs have demonstrated a substantial likelihood of success on the merits. The absence of any reasonable analysis, factual support or rational foundation for the rates developed by DHS indicates a substantial likelihood that plaintiffs will succeed in demonstrating DHS' assurances that the rates are reasonable and adequate to meet the costs of efficiently and economically operated hospitals and that the rates assure reasonable access to inpatient hospital services, were not based upon proper findings of fact as required by 42 C.F.R. § 447.252(B), and that, as such, DHS' adoption of the payment rates was arbitrary and capricious and in violation of the federal laws. *California Hospital Association v. Schweiker,* 559 F.Supp. 110, 117 (C.D.Calif. 1982); *Thomas v. Johnston,* 557 F.Supp. 878, 910-11 (W.D. Tex. 1983).

Essentially the plan methodology concludes that the most a hospital will be reimbursed is the 60th percentile

for the year 1980 reimbursement plus an inflation factor. The plan thus concludes each hospital in the upper 40% of the 1980 reimbursement plus inflation will be reimbursed in 1983 "the costs it must incur as an efficient and economically run hospital." Such a conclusion, if the result of a rational analysis of factors relative to an efficiently and economically run hospital, will pass the test of arbitrariness. However, if the conclusion is not centered in a rational relationship to the Medicaid costs that must be incurred by the efficiently and economically run hospital, but in fact is arrived at to fit within available departmental budgeted funds, it will not pass the congressionally mandated test. In summary, the plaintiffs' evidence thus far has established the defendant arbitrarily determined a hospital in 1983, if operated efficiently and economically, will be reimbursed its Medicaid patient costs that must be incurred by receiving the 60th percentile for the 1980 reimbursement period plus the inflation factor.

6. Plaintiffs have also demonstrated a substantial likelihood that they will succeed on the merits with respect to plaintiffs' claim that defendants did not afford Oklahoma's MCAC the opportunity to participate in a meaningful manner in development of the new Medicaid reimbursement methodology, as required by 42 C.F.R. § 431.12.

7. Plaintiffs have no adequate remedy at law because, under the Eleventh Amendment to the United States Constitution, Oklahoma is immune from suit in federal court for retroactive money damages. *Florida Department of Health and Rehabilitative Services v. Florida*

Nursing Home Association, 450 U.S. 147, 150, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981). Therefore, if the plaintiffs ultimately recover on the merits they will be irreparably injured by the continuing monthly reimbursement shortfall as any damage award may not be retroactive to April 1, 1983.

8. As for the evidence concerning threatened injury to the plaintiffs outweighing whatever injury the proposed injunction may cause the defendants, the Court concludes the scales tip in favor of the defendants. The evidence demonstrates that DHS has recently undertaken extensive cost containment measures in all of its programs and not just in the area of Medicaid. The state appropriation for DHS for fiscal year 1984 provided approximately $40,000,000.00 less than the anticipated DHS budgetary requirements for the fiscal year. The budgetary problems of DHS have exacerbated by continuing monthly reductions in sales tax revenues. The issuance of an injunction would compel DHS to make additional reductions or perhaps eliminate programs and services which are already financially troubled in order to comply with the court mandated increases in Medicaid reimbursement. It is a matter of weighing the present temporary hospital reimbursement shortfall against the DHS budget chaos that would result from instant reversion to the Medicare cost reimbursement pre-April 1, 1983. However, should the plaintiffs prevail on the merits, they should not be expected to tolerate the continuing reimbursement shortfall injury long. (For this reason trial on the merits will be set at an early date.)

9. In weighing the public interest or public policy factors, the considerations appear about equal. On the

one hand it is in the public interest for all DHS' sound established programs and services to continue at reasonable budgeted levels and also to encourage reasonable medical cost containment. On the other hand, the public has a strong interest in insuring public agencies obey the law and insuring continued availability of needed medical services to indigents.

10. For the reasons expressed above, particularly criteria number 3 concerning injury to the defendants being greater than the temporary injury experienced by the plaintiffs should the preliminary injunction be issued, the plaintiffs' application for temporary injunction is denied.

11. All evidence received at the hearing on plaintiffs' request for a preliminary injunction is now a part of the record on the trial of this action and need not be repeated at trial. Rule 65(a)(2), F.R.Civ.P. The scheduling for trial on the merits is as follows:

(a) Exchange of the names and addresses of all witnesses including experts in writing on or before September 9, 1983;

(b) Final discovery cut-off is set for Wednesday, September 21, 1983;

(c) Final pretrial conference is set for Tuesday, September 27, 1983 at 8:30 A.M., *in Tulsa, Oklahoma;*

(d) Final pretrial order is to be filed by Friday, September 30, 1983;

(e) Suggested Findings of Fact and Conclusions of Law are to be filed on or before Tuesday, October 4, 1983;

(f) The case is set for trial to the Court on Tuesday, October 11, 1983 at 9:30 A.M.

IT IS SO ORDERED this 24th day of August, 1983.

/s/ THOMAS R. BRETT
United States District Judge